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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor,
Plaintiff, Defendant in Error, Petitioner,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue,
Defendant, Plaintiff in Error, Respondent.

BRIEF FOR THE PETITIONER.

O. WALKER TAYLOR,
Attorney for Plaintiff.

EVERETT S. WHITE,
of Counsel.

L. H. LANE, Law Printer, 221 High Street, Boston.

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No. 468.

ROBERT M. LEACH, EXECUTOR,
PLAINTIFF, DEFENDANT IN ERROR, PETITIONER,
v.
MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANT, PLAINTIFF IN ERROR, RESPONDENT.

BRIEF FOR THE PETITIONER.

THE NATURE OF THE PROCEEDING.

This is a review of a decision of the United States Circuit Court of Appeals for the First Circuit which reversed a judgment for $5,672.81, rendered in favor of the plaintiff, petitioner herein, by the United States District Court for the District of Massachusetts. The opinion of the Circuit Court of Appeals is reported as *Nichols, Collector,* v. *Leach, Executor,* in 50 Fed. (2) 787 (Rec. pp. 163–174), and that of the District Court, as *Leach, Executor,* v. *Nichols, Collector,* in 42 Fed. (2) 918 (Rec. pp. 147–157).

JURISDICTION.

The case is before this Honorable Court upon a writ of certiorari granted by an order entered herein on December 7, 1931. The petition for certiorari was filed on October 19, 1931, pursuant to the provisions of the Act of February 13, 1925, c. 229, Section 1 (43 Stat. 938; U. S. Code, Title 28, Section 347).

STATEMENT OF THE CASE.

The suit is an action of contract brought to recover a portion of the "Federal Estate Tax", which the plaintiff originally alleged was wrongfully and erroneously assessed and collected from the estate of William E. Walker, late resident of Taunton, Massachusetts, of which the petitioner is executor, under the provisions of Title II of the Revenue Act of September 8, 1916, as amended (39 Stat. c. 463, pp. 777–780; Comp. Stat. 1916, § 6336½a–§ 6336½m), and the War Revenue Act of October 3, 1917 (40 Stat. c. 63, pp. 324–325; Comp. Stat. 1918, Comp't. Ed. § 6336½bbb).

The amount of the recovery originally sought was $49,634.74 together with interest. Since the suit was brought, however, $44,880.75 has been refunded and most of the issues originally involved have been settled or abandoned and are no longer in dispute.

The sole matter now in controversy is whether or not, upon the facts and the law of the case, the plaintiff, petitioner herein, was and is entitled to recover that portion of the "Federal Estate Tax", $3,692.44 with interest of $1,980.37, or a total of $5,672.81, which results from the refusal of the Commissioner of Internal Revenue, in making his determination of that tax to deduct under Section 203 (a) (1) of the Federal Act (Comp. Stat. 1918, § 6336½d), the State "transfer" or "succession" tax, amounting to $34,158.59, which the executor was required to pay and did pay (Rec. pp. 143–145) to the Commonwealth of Massachusetts under General Laws of Massachusetts, Chapter 65.

THE ISSUES DECIDED BY THE DISTRICT COURT.

The District Court, in its opinion, does not discuss or cite authorities on the question of the deductibility of the Massachusetts tax and treats that question as settled because the only defenses which the defendant, respondent herein, relied upon in the District Court were (1) that the Court was without jurisdiction since the suit had been prematurely brought and (2) that the plaintiff had not sufficiently complied with the statutes and regulations in regard to claims for refund (Rec. p. 180). Upon the issues raised under these two defenses, the District Court held and ruled as follows:

(1) That the "Court had jurisdiction of the subject matter and the parties" (Rec. p. 152);

(2) That the tax as determined by the Commissioner "is not the correct tax measured by the net estate in view of decisions of the courts;

(3) That "the claim for refund filed on June 20, 1925 (Rec. pp. 111–119) conformed to the statutes and regulations" (Rec. p. 153);

(4) That "the plaintiff should not be prejudiced by his failure to include in the original claim for refund a claim based on the refusal of the Commissioner to deduct the Massachusetts tax" (Rec. p. 155);

(5) That the "amendment" to the original claim (Rec. pp. 133–144) "only operated to submit to the Commissioner formally what had already been informally presented on the re-opened original claim" (Rec. p. 154);

(6) That "in a matter involving an estate tax it would be peculiarly compatible with justice to give effect to such an amendment in as much as the statute lays upon the Commissioner the positive duty of ascertaining the correct tax and refunding any excess" (Rec. p. 154); and

(7) That "the plaintiff is entitled to recover a judgment in this action but only to the extent that the tax was increased by the refusal of the Commissioner to deduct the legacy and succession tax paid to the Commonwealth of Massachusetts" (Rec. p. 156).

THE ISSUES ERRONEOUSLY DECIDED BY THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals, the petitioner respectfully submits, erroneously reversed the judgment of the District Court on the sole ground that the Massachusetts tax was not, as a matter of law, properly deductible under Section 203 (a) (1) of the Act, and in its opinion erroneously held and ruled:

(1) That "it is unnecessary to determine" the questions in regard to claims for refund and amendments thereto which were decided by the District Court (Rec. p. 167);

(2) That "the District Court erred in holding that the Massachusetts succession tax was deductible, which is decisive of the case" (Rec. p. 167);

(3) That "the nature of the Massachusetts tax has been definitely settled by the decisions of the Massachusetts Courts and by this Court in the case of *Saltonstall* v. *Saltonstall*, 276 U. S. 260 (Rec. p. 169);

(4) That the Massachusetts tax has not "become a charge upon the estate within the meaning of Section 203 (a) (1) of the Revenue Act of 1916", as amended (Rec. p. 169);

(5) That "amendments to a claim for refund may be allowed within the four year period and that the Commissioner may waive the provision of the regulations as to the form of a claim; but whether the four year period is a period of limitations as to any new grounds not included in the original claim *is not clear*" (Rec. p. 166).

(6) That the "provision in Section 403 of the Revenue Act of 1918, expressly prohibiting the deduction of estate and succession taxes, was merely declaratory of the intent of Congress in Section 203 (a) (1) of the Revenue Act of September 8, 1916, as amended (Rec. p. 172); and

(7) That the deduction of the Massachusetts tax would "render it necessary to resort to algebraic equations to determine" the amount of the Federal Estate tax (Rec. p. 172).

SPECIFICATION OF ERRORS.

The petitioner respectfully submits that the Circuit Court of Appeals erred in the following respects:

1. In reversing the judgment of the District Court on an entirely different ground from those upon which the District Court decided the case;

2. In holding and ruling that, as a matter of law, the Massachusetts tax was not a proper deduction under Section 203 (a) (1) of the Revenue Act of September 8, 1916, as amended;

3. In failing to decide the disputed issues in regard (1) to the jurisdiction of the District Court and (2) to the plaintiff's claim for refund and the amendment thereto.

Upon all the facts and the law of the case the petitioner respectfully submits the following questions for the decision of this Honorable Court:

THE QUESTIONS PRESENTED FOR THE DECISION OF THIS COURT.

1. As a matter of procedure, was the question of the deductibility of the Massachusetts tax properly before the Circuit Court of Appeals?

2. As a matter of law, was the Massachusetts tax a proper deduction from the gross value of the estate under Section 203 (a) (1) of the Revenue Act of September 8, 1916, as amended?

3. Did the District Court have jurisdiction of the subject matter and of the parties at the time the suit was brought?

4. Did the plaintiff's "original claim for refund" and the "amendment" thereto, which was filed while the suit was still pending and conformed to the amended declaration, sufficiently comply with the requirements of Section 3226 of the Revised Statutes and the regulation established in pursuance thereof?

STATEMENT OF THE FACTS.

The essential facts of the case, for the purposes of this review, briefly stated, are as follows:

William E. Walker, the decedent, died a resident of Taunton, Massachusetts, on November 9, 1918. The petitioner herein duly qualified as executor of the estate (Rec. pp. 66–67) and on May 8, 1919, filed the required estate tax return (Rec. pp. 67–75) and paid the sum of $37,700.68, which was the total tax disclosed on the return. After notice and demand, additional sums were paid, $50,000 on February 21, 1922, and $2,034.96 on March 4, 1922, thus making a total of $89,735.64, all of which was paid to the respondent herein, who was then Collector of Internal Revenue at Boston.

The estate was also subject to the "transfer" or "succession" tax imposed by General Laws of Massachusetts, Chapter 65, and on November 10, 1919, the petitioner as executor paid to the Commonwealth of Massachusetts a tax in the amount of $34,158.59. The notice and demand for the Massachusetts tax was addressed to the petitioner as executor; the tax was paid by him out of the proceeds of the estate before its distribution and the Probate Court allowed the item as "an administration expense" in the executor's final account (Rec. pp. 142–144).

On June 20, 1925, the petitioner herein filed a claim and

requested refund of $49,634.74 "or such greater amount as is legally refundable" (Rec. pp. 111–119). The claim did not specifically refer to the refusal of the Commissioner to deduct the Massachusetts tax as one of the "reasons" why the tax as finally determined by the Commissioner was excessive, or erroneous. On November 16, 1925, the petitioner was advised orally that the claim had been rejected (Rec. p. 152). Written notice of the rejection was given by a letter dated January 16, 1926 (Rec. p. 120)

This action was begun by a writ dated December 1, 1925, and the amount alleged to be recoverable in the original declaration, which is not shown in the record, was $49,634.73. The case was heard on the original pleadings on November 17, 1926, before Honorable James A. Lowell, District Judge, with a jury, and the Court directed a verdict for the defendant. The plaintiff, petitioner herein, appealed and the Circuit Court of Appeals, in its previous opinion, rendered on December 27, 1927, and reported in 23 Fed. (2) 275 (Rec. pp. 5–11), reversed the judgment and remanded the case to the District Court for retrial (Rec. p. 1).

After the case had thus been remanded to the District Court the Commissioner of Internal Revenue re-opened and re-considered the "original claim for refund" (Rec. pp. 24–30), which he had previously rejected in its entirety, and on June 20, 1928, refunded to the petitioner, as executor, the sum of $43,863.37, together with interest, which represented that portion of the tax which had been paid upon certain property previously held, by the Commissioner, to have "been made by the decedent in contemplation of death" (Rec. p. 15).

On September 28, 1928, the petitioner filed a motion (Rec. p. 11) "to amend his declaration by substituting therefor the plaintiff's amended declaration" (Rec. pp. 12–18), which was allowed by the Court on October 28, 1928 (Rec. p. 12). The defendant, respondent herein, objected to the allowance of the motion on the ground that the amended declaration did not conform to the claim for refund upon which the suit was brought. The Court overruled the objection and expressly saved an exception but the defendant failed (1) to perfect an appeal upon the exception thus saved, (2) to file a motion to

dismiss, or, (3) to demur to the amended declaration, and (4) thereafter answered to the merits (Rec. pp. 19–20).

Before the case came on for retrial, the plaintiff, petitioner herein, filed an "Amendment to the Claim for Refund" (Rec. pp. 133–144) which did in every respect conform to the amended declaration. The Collector of Internal Revenue accepted the "Amendment to the Claim for Refund" without objection and officially stamped thereon the date of its receipt (Rec. p. 133). The Commissioner of Internal Revenue officially considered the document and on August 21, 1929, again redetermined the tax and allowed the plaintiff a further refund of $1,017.38, which was *one* of the items specified in the "Amendment", but refused to grant refund on account of any of the other items therein specified (Rec. pp. 150, 144–145).

On February 19, 1930, the case was heard on the amended pleadings before Honorable Elisha H. Brewster, District Judge, without jury, trial by jury having been waived by written stipulation. During the oral argument at the trial, reference was made to a recent decision of the United States Court of Claims (*Merrill et al.* v. *United States*, 66 Ct. Cls. 136) and to a previous decision of the District Court of Massachusetts (*Thayer* v. *Malley* (Morton J.) 3 Fed. (2) 194), both of which had expressly held that the Massachusetts tax was a proper deduction under Section 203 (a) (1) of the Act. Reference was also made to other decisions which had held that the same kind of "transfer" or "succession" taxes imposed by the States of New York, Pennsylvania, Maryland and Utah had been held to be properly deductible, and to the fact that the Government had acquiesced in all of those decisions. With these decisions in mind the District Court (Rec. p. 177) asked counsel for the defendant, respondent herein, the following question:

> "Apart from technicalities and getting at the justice of the thing, you have collected some tax you ought not to have, in view of the decisions of the Courts, in regard to deducting the collected State taxes?"

Counsel for the respondent replied as follows:

> "There is no doubt that the Massachusetts Inheritance tax has been held to be deductible from the gross estate."

On January 29, 1931, the District Court ordered judgment to be entered for the plaintiff in the amount of $3,692.44, damages, together with interest amounting to $1,980.37 and his costs (Rec. p. 34). On December 2, 1930, the defendant, respondent herein, filed his Substitute Bill of Exceptions (Rec. pp. 34–66) and filed his Petition for Appeal (Rec. p. 157) and Assignment of Errors (Rec. pp. 158–160) on January 29, 1931.

On April 22, 1931, the case was heard upon the transcript of the Record of the District Court before the United States Circuit Court of Appeals, which on June 10, 1931, ordered, adjudged and decreed that "the judgment of the District Court is reversed with costs" (Rec. p. 195).

On July 9, 1931, the appellee filed a petition for rehearing (Rec. pp. 175–194), which was denied by the Order of the Court on July 22, 1931 (Rec. p. 195). On August 7, 1931, the appellee, petitioner herein, filed a motion in the United States Circuit Court of Appeals to reconsider the petition for rehearing and on August 14, 1931, the Court denied the motion (Rec. p. 196).

On October 19, 1931, the petitioner filed his petition for certiorari, which was granted by an order of this Honorable Court entered on December 7, 1931 (Rec. pp. 196–197).

STATUTES INVOLVED.

In so far as the decision of the Circuit Court of Appeals is concerned the only statutes involved in the case are the following:

Revenue Act of 1916, effective September 8, 1916, as amended March 3, 1917 (Chap. 463, 39 Stat. 778).

Section 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of gross estate—

Revenue Act of 1918, effective February 24 1919 (Chap. 18, 40 Stat. 1060).

Section 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of gross estate—

(1) "Such amounts for funeral expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and *such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.*"

(1) "Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, *but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy or inheritances taxes.*"

. . . . . .

General Laws of Massachusetts, Chapter 65:

SUBJECTS AND RATES OF TAXATION.

"Section 1. *All property* within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, *which shall pass* by will, or by laws regulating intestate succession . . . shall be subject to a tax at the percentage rates fixed by the following table: . . ."

"Section 6. *Administrators, executors* and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom benefi-

cial interests shall accrue by survivorship, *shall be liable for the taxes imposed by this chapter*, with interest, until the same have been paid.

"Section 7. *Taxes imposed by this chapter upon* property or interests therein, *passing by will* or by laws regulating interstate succession, *shall be payable to the state treasurer by the executors*, administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustees, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled."

"If the probate court, acting under section thirteen of chapter one hundred and ninety-seven, has ordered the executor or administrator to retain funds to satisfy a claim of a creditor, the payment of the tax may be suspended by the court to await the disposition of such claim. . . ."

"Section 9. Property of which a decedent dies seized or possessed, subjected to taxes as aforesaid, in whatever form of investment it may happen to be, and all property acquired in substitution therefor, *shall be charged with a lien for all taxes and interest* thereon which are or may become due on such property. . . ." (Italics ours.)

"Section 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. . . ."

The various statutes and regulations upon which the decision of the District Court rests are presented and commented upon in the argument below.

ARGUMENT.

I.

THE QUESTION OF THE DEDUCTIBILITY OF THE MASSACHUSETTS TAX WAS NOT, AS A MATTER OF PROCEDURE, PROPERLY BEFORE THE CIRCUIT COURT OF APPEALS FOR ITS DECISION.

From the statement of facts presented above, it is clear that the respondent, as defendant in the District Court, did not contend that as a matter of law the Massachusetts Tax was not a proper deduction. As pointed out in the opinion of the District Court the only defenses relied upon were (1) that the Court was without jurisdiction and (2) that the petitioner as plaintiff had not sufficiently complied with the statutes and regulations in regard to the filing of the requisite claim for refund. In view of these facts, the petitioner respectfully submits that the Circuit Court of Appeals should have decided specifically the questions presented in the District Court.

It is a universal rule with few exceptions that Courts of Review will consider only those questions which have been presented and ruled upon by the Lower Court and that the parties on appeal must adhere to the theory on which the case was prosecuted or defended in the Lower Court.

> *San Juan Light & Tr. Co.* v. *Requena*, 224 U. S. 89;
> *Tucker* v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228;
> *United States* v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9.

In the case of *Tucker* v. *Alexander, supra*, Mr. Justice Stone said:

> "In our view of the case the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913."

II.

AS A MATTER OF LAW, THE TAX IMPOSED BY GENERAL LAWS OF MASSACHUSETTS, CHAPTER 65, WAS A PROPER DEDUCTION FROM THE GROSS VALUE OF THE ESTATE, UNDER SECTION 203 (a) (1) OF THE REVENUE ACT OF SEPTEMBER 8, 1916, AS AMENDED.

The Circuit Court of Appeals in its opinion holds that the tax imposed by the Massachusetts statute is a tax upon the "receipt" of property or in other words upon the "legacy" or the "succession" as a separate and distinct entity and that it is therefore a "claim" or "charge" not against the estate, but against each separate "legacy" or "succession". The petitioner respectfully submits the following:

First: By the Clear Language of the Statute the Massachusetts Tax is Imposed Upon the "Passing" or "Transfer" of the Property of the Estate.

The opinion of the Circuit Court of Appeals (Rec. p. 169) holds that the "nature of the Massachusetts tax has been definitely settled" by decisions of the Massachusetts Courts, "which construction was adopted" by a decision of this Court, and cites:

Attorney General v. *Stone*, 209 Mass. 186;
Boston Safe Dept. & Tr. Co. v. *Com'r of Corp. & Tax.*, 267 Mass. 240;
Saltonstall v. *Saltonstall*, 276 U. S. 260.

However, a careful study of the Massachusetts decisions will show that they are in great conflict as to the "nature of the Massachusetts tax" and that there are numerous other Massachusetts decisions, not cited in the opinion, which clearly hold that the tax is imposed upon the "transmission" of the property by the decedent, as well as upon the "receipt" of the property by the legatee.

Magee v. *Commissioner of Corp'ns & Tax.*, 256 Mass. 513;
Hollis v. *Treas. & Rec. Gen.*, 242 Mass. 163;
Pratt v. *Dean*, 246 Mass. 300;
Bingham v. *Com'r of Corp. & Tax.*, 249 Mass. 79.

The Circuit Court of Appeals for the Fourth Circuit was confronted with exactly the same situation in regard to the conflicting constructions which the State Courts put upon the statute of Maryland, which is similar to the Massachusetts statute.

Miles v. *Curley et al.*, 291 Fed. 761.

In the above case the Court held that the Maryland tax was a proper deduction under Section 203 of the Act and in its opinion, at page 763, said:

> "In the case at bar, each side has argued that the Court of Appeals of this State has interpreted the act in the sense for which it contends, and each quotes language which, if standing alone, might sustain its position. That each is able to do so is perhaps the best proof that the attention of that high court never had been drawn to the precise point now at issue, in such sense, at least, as to call for its definite determination."

The Circuit Court of Appeals for the First Circuit considered only one group of the conflicting decisions of the Massachusetts Courts and completely disregarded the other decisions where the language used in the opinion holds exactly to the contrary.

In the case of *Hollis* v. *Treas. & Rec. Gen.*, 242 Mass. 163, the language used by Mr. Chief Justice Rugg is typical of a long line of Massachusetts decisions. In that case the Court said:

> "It is plain as a practical matter that the amount of money so paid for excise taxes never passes to anybody by sucession from the deceased resident. Money so paid is a pecuniary burden laid for the support of government upon the privilege of transmitting and receiving property by will or by intestate succession. A succession tax law ought not to be so interpreted as to exact an excise on the succession of that which in fact cannot pass to any beneficiary because seized by the State on its way from the dead to the living, unless the words of the statute leave no other alternative. *Newcomb* v. *Paige*, 224 Mass. 516. Such a tax apart from its technical legal significance would be in substance and effect a tax on a tax and not a tax on

> the succession of property. . . . By G. L. c. 65, § 1 (which does not differ in this respect from pre-existing statutes), 'All property within the jurisdiction of the Commonwealth . . . which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a tax.' . . . If the executor takes the property directly he must, in order to secure a transmissible title, invoke the laws of such taxing State and pay the tax. *Bliss* v. *Bliss*, 221 Mass. 201, 205. In either event the actual amount of property which he can transmit under the will must be depleted by the amount of the taxes so paid. . . ."

As further proof that the "nature of the Massachusetts tax has not been settled" by the three cases referred to in the opinion of the Circuit Court of Appeals, the attention of this Court is respectfully invited to the language of the opinion in the case of *Saltonstall* v. *Treas. & Rec. Gen'l*, 256 Mass. 519, which came to this Court upon a writ of error and is reported as *Saltonstall et al.* v. *Saltonstall et al.*, 276 U. S. 260. In that case, 256 at page 523, Mr. Chief Justice Rugg said:

> "In *Attorney General* v. *Stone*, 209 Mass. 186, at 190 occur these words: '*This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with.* *Minot* v. *Winthrop*, 162 Mass. 113, 124; *Crocker* v. *Shaw*, 174 Mass. 266, 267. The privilege is not fully exercised until the property shall have come into the possession of the beneficiary. This rule underlies the reasoning of *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588. And see the cases there cited. Until the full exercise of such privilege and while as yet no tax has been assessed and paid thereon, we see no reason why, by a general rule applicable to all such cases, any pending liability to taxation may not be regulated so as to subject it to a just and uniform method of assessment, even though some change may thereby be made from the method previously adopted." (Italics ours.)

Two other cases the respondent refers to in this connection

are also clearly distinguishable from the case at bar and equally impertinent to the issues here involved:

Boston Safe Dep. & Tr. Co. v. *Com'r. of Corp. & Tax.*, 267 Mass. 240;

Coolidge et al. v. *Long, Com'r of Corp. & Tax.*, 51 S. Ct. 306.

In both of the above cases the essential question was whether or not the Commonwealth of Massachusetts under its statute could subject to taxation property involved in trusts which had been created many years before the decedent's death. The fact that the Courts in those cases said that the interests of the respective beneficiaries under the trusts could properly and constitutionally be reached and taxed under the Massachusetts statute does not mean that the Courts construed the statute to mean that the tax was imposed upon each such interest as a separate and distinct "taxable entity".

In the case of *Pratt* v. *Dean*, 246 Mass. 300, at 309, Mr. Chief Justice Rugg in interpreting the Massachusetts Statute said:

> "The dominant purpose manifested by the statute is that the aggregate of property or property interests passing to another from one benefactor on his death, whether by will or other donative instrument, shall be treated as a single subject of the excise tax. If this were not so, the purpose of a graduated tax, increasing with the value of the property or interest passing, and with exemptions, could be entirely frustrated by the simple device of splitting a large estate into small parts by trusts and deeds and other instruments of gift, each passing property or property interests not in excess of the exemption. Statutes designed to secure revenue for the support of government ought not to be so interpreted as to be susceptible of being rendered thus ineffectual unless required by plain words.
>
> This conclusion is reached by interpretation of the tax statute and with full realization of the general principle that tax laws are to be strictly construed, that the right to tax is not to be extended by implication, and that doubts are to be resolved in favor of the taxpayer. *Eaton Crane & Pike Co.* v. *Commonwealth*, 237 Mass. 523, 530."

Regardless of the nature of the Massachusetts tax, it must be paid out of the property of the estate. If the will of the decedent makes no specific provision for the payment of the tax, the executor turns over the legacies and distributive shares free and clear and pays the tax out of the residue of the estate. If the will provides that the tax shall be deducted from each legacy or distributive share, the tax is still a "charge" upon the estate because the legacies themselves are a part of the estate. It is thus apparent that even if the Massachusetts statute did not say in plain words that "all property which shall pass . . . shall be subject to the tax", nevertheless, in its final analysis, the "incidence" of the tax is the "transmission of the property".

Knowlton v. *Moore*, 20 S. Ct. 747; 178 U. S. 41.

In the able and exhaustive opinion, in the above case, Mr. Chief Justice White said:

> "Thus looking over the whole field, and considering death duties in the order in which we have reviewed them . . . that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted in the legislation of the United States and the several states of the Union, . . . the following appears: Although different modes of assessing such duties prevail and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

The petitioner respectfully submits that these words of Mr. Chief Justice White are timely and pertinent, notwithstanding the fact that this Court has held that the tax imposed upon

estates by the State of New York was a tax "on the right of the individual beneficiaries".

New York Trust Co. v. *Eisner*, 41 S. Ct. 506; 256 U. S. 345.

Second: The Nature of the Massachusetts Tax is Not Decisive of the Specific Issue here Involved.

The petitioner respectfully submits that even if the Massachusetts Statute should be construed as imposing the tax upon the "legacy" or the right of the beneficiaries to receive the property, nevertheless, the tax in the instant case is deductible under Section 203 (a) (1) of the Act. The nature of the Massachusetts tax is immaterial. The controlling factors of the case at bar are:

1. That Section 6 of the Massachusetts Statute says that "executors shall be liable for the taxes imposed by this chapter";
2. That Section 7 says that the taxes imposed by this chapter upon property passing by will shall be payable to the State Treasurer by the executors;
3. That in the instant case the notice and demand for the taxes was served upon the executor by the Massachusetts tax officials (Rec. pp. 142–144);
4. That the tax was actually paid by the executor out of the property of the estate before its distribution; and
5. That the payment of the tax is under the Massachusetts Statute an allowable item in an executor's account and was actually allowed in the instant case by the Probate Court under the jurisdiction of which the estate was administered.

Thus, whatever the nature of the Massachusetts tax may be, it was obviously and clearly "such a charge against the estate as was allowed by the laws of the jurisdiction" under which the estate was administered as is provided in Section 203 (a) (1) of the Federal Statute.

Third: On the Great Weight of Authority of Federal Court Decisions the Massachusetts Tax was a Proper Deduction.

The decision of the Circuit Court of Appeals in the case at bar is the only instance in which any court has held that the Massachusetts tax was not a proper deduction under Section 203 (a) (1) of the Act. It not only reverses the decision of the District Court in the case at bar, but is contrary to a previous decision of the District Court of Massachusetts, which the Government did not appeal, and a decision of the Court of Claims in which certiorari was not applied for. It is also in conflict with the decisions of other circuits and of this Court involving the question of the deductibility of taxes of other states which, in all of their essential respects, are similar to the Massachusetts tax.

Merrill v. *United States*, 66 Ct. Cl. 136; certiorari not applied for;

Thayer v. *Malley* (Dist. of Mass., Morton, J.), 3 Fed. (2) 194; no appeal taken;

Kearns v. *Dunbar*, 292 Fed. 1013 (D. C. Utah), no appeal taken;

Kombst et al. v. *United States*, Ct. Cls. (unreported, dec. Nov. 2, 1931);

Lederer v. *Northern Trust Company* (Third Circuit), 262 Fed. 52; certiorari denied, 40 S. Ct. 483; 253 U. S. 487;

Miles v. *Curley* (Fourth Circuit), 291 Fed. 761; certiorari not applied for;

Edwards v. *Slocum*, 44 S. Ct. 293; 264 U. S. 61;

United States v. *Field*, 41 S. Ct. 256; 255 U. S. 257;

Keith v. *Johnson*, 44 S. Ct. 415; 271 U. S. 1.

In the case of *Merrill et al.* v. *United States, supra*, Judge Moss of the Court of Claims said:

> "The attention of the Court is called to the fact that the decision in the case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345, overruled the *Thayer* v. *Malley Case* on that point, but it should also be noted that the latter case of *Keith* v. *Johnson*, 271 U. S. 1, in turn reversed the ruling in

the Eisner Case on the same point. In the case of *Keith* v. *Johnson*, which involved the question of the deductibility of the New York inheritance tax from the gross income of the estate for Federal income tax purposes, the court held that the inheritance tax was deductible citing with approval *United States* v. *Woodward*, 256 U. S. 632. In *United States* v. *Mitchell*, 271 U. S. 9, decided on the same day, the court confirmed the right of the executor to deduct the Texas inheritance tax from the gross income of the estate, holding that the Texas law was similar to that of New York. In this connection it should be observed that the New York inheritance tax law in its essential provisions is identical with the Massachusetts Statutes and it was so declared in the Thayer Malley Case."

"Section 703 (a) (4) of the recent Revenue Act of 1928 provides that:

> 'In determining the net income of an heir devisee, legatee, distributee, or beneficiary . . . or of an estate, for any taxable year, under the Revenue Act of 1926, or any prior Revenue Act, the amount of estate, inheritance, legacy, or succession taxes paid or accrued within such taxable year shall be allowed as a deduction. . . .'

While this act deals explicitly with the question of the deductibility of the classes of tax named therein for federal income tax purposes, the government has seemed to recognize that where an inheritance tax is deductible from the gross income of the estate for income tax purposes, it is also a proper deduction from the value of the gross estate for estate tax purposes. However that may be, the court has reached the conclusion, upon a full consideration of the case, that the inheritance tax paid by the administrators herein to the commonwealth of Massachusetts was a charge against the estate within the meaning of the taxing statute, and should have been deducted from the value of the gross estate. Plaintiffs are entitled to judgment, and it is so adjudged and ordered."

In this connection we beg particularly to call to the attention of this Honorable Court the situation referred to by

Judge Morton of the District Court of Massachusetts in the case of *Thayer* v. *Malley, supra*, where he said:

> "It would, I think, be a decidedly unjust result to hold that under this federal statute the state tax was deductible in one state and not deductible in another, upon a subtle legalism without practical value. The broader view seems to me the sounder one, viz., that such taxes as in fact have to be paid to the state upon the succession are to be deducted before the federal tax is assessed and come within the language of the act as 'other charges against the estate . . . allowed by the laws of the jurisdiction . . . under which the estate is being administered'. Comp. St. § 6336½d."

In the case of *Keith* v. *Johnson, supra*, which involved the New York tax, Mr. Justice Butler, who delivered the opinion of the Court, said:

> "The transfer tax law imposes a tax 'upon the transfer of property' from the deceased (section 220) at rates graduated, according to the amount transferred to each beneficiary and the relationship, or absence of any, between the deceased and beneficiaries. Section 221, 221 (a). Until paid the tax is a lien upon the property of the deceased. The person to whom the property is transferred is made personally liable for the tax. The personal representatives of the deceased are personally liable for the tax until its payment; they are authorized to sell the property of the estate to obtain money to pay the tax in the same manner as they may to pay debts of the deceased. Section 224. They are not entitled to discharge until the tax is paid. Section 236. The law plainly makes it their duty to pay the tax out of the estate. The property remaining passes to the beneficiaries. When property is transferred without the deduction of the tax the beneficiary is required to pay. But, by whomsoever the amount may be handed over to the state, the tax is in effect an appropriation by the state of a part of the property of the deceased at the time of death, and the state's portion is deductible from the legacy and does not pass to the legatee."

It is unnecessary to quote from the opinions of all of the cases cited above. It is sufficient to state that after the Government failed to apply for certiorari in the Merrill case, as the Records of the Court of Claims will show, it was the established policy of the Commissioner of Internal Revenue to allow the deduction of the Massachusetts Tax and such taxes of other States under Section 203 (a) (1) of the Revenue Act of September 8, 1916. In view of this fact and of the language used by Judge Morton of the District Court of Massachusetts in the case of *Thayer* v. *Malley*, it is respectfully submitted that the opinion of the Court of Appeals in this instance is extremely unjust and operates as a discrimination upon the estate here involved.

Fourth: Section 203 (a) (1) of the Act of September 8, 1916, as amended, should not be construed as having the same effect as Section 403 (a) (1) of the Revenue Act of 1918.

By reference to the two sections it will be seen that Section 203 (a) (1) of the Act of 1916, as amended, provides in effect that all "charges" against the estate shall be deducted. Section 403 (a) (1) of the Act of 1918 expressly says that such charges shall not include any estate, succession or inheritance taxes. The opinion of the Circuit Court of Appeals (Rec. pp. 172–173) states that the Court in another case has determined:

> "That the provision in Sec. 403 (a) (1) of the Revenue Act of 1918, that estate and succession taxes should not be deducted, was merely declaratory of the intent of Congress in Sec. 203 (a) (1) of the Act of 1916; that it was, as the committee of Congress stated at the time the change was proposed, merely 'intended for the sake of clarification' ".

The statement of the Committee of Congress thus referred to is found in—

Senate Reports, Vol. No. 1, 65th Congress, 3d Session, 1918–1919:

At page 42 of the report, the Committee states:

> "Section 403, which takes the place of Section 203 of the original act defining the deductions for the purpose of arriving at the net estate, inserts a provision that income taxes upon income received after the death of the deced-

ent, and estate, succession, legacy or inheritance taxes, are not to be deducted. . . . These provisions are in conformity with existing rulings in the administration of the law, which rulings the Committee thinks are in accord with the statute, and are now included for the sake of clarification, as in the case of additions made to Section 402 mentioned above."

Section 402 of the Act of 1918 thus referred to by the Senate Committee expressly provided (1) that trusts and (2) powers of appointment, created before the passage of the Act, should be included in the gross estate. Section 202 of the Act of 1916 did not contain such express provisions, but the Treasury Department under its regulations, as the Committee states, interpreted Sections 202 and 203 of the Act of 1916 to mean exactly the same as Sections 402 and 403, respectively, of the Act of 1918.

The retrospective interpretation of Section 403 of the Act of 1918, which the Circuit Court of Appeals, in the case at bar, has applied to Section 203 of the Act of 1916, is directly in conflict with the interpretation put upon Section 403 by (1) the Circuit Court of Appeals for the Third Circuit, which held that the Pennsylvania tax was deductible, (2) the Circuit Court of Appeals for the Fourth Circuit, which held that the Maryland transfer tax was deductible, and (3) the United States Court of Claims, which held that the Massachusetts transfer tax was deductible, under Section 203 of the earlier Act. Such retrospective interpretation is also in direct conflict with the interpretation which this Honorable Court has, in two instances, put upon Section 402 of the Act of 1918 as applied to Section 202 of the Act of 1916.

Lederer v. *Northern Trust Company*, 262 Fed. 52, 54; certiorari denied, 40 S. Ct. 483;
Merrill et al. v. *United States*, 66 Ct. Cls. 136;
Miles v. *Curley*, 291 Fed. 761;
United States v. *Field*, 41 S. Ct. 256; 255 U. S. 257;
Shwab v. *Doyle*, 258 U. S. 529, 536.

In *Lederer* v. *Northern Trust Company*, *supra*, which held that the Pennsylvania tax was deductible under Section 203 of

the 1916 Act, Judge Wooley of the Third Circuit, referring to Section 403 of the 1918 Act, said:

> *"As this case arose before the Act of February 24, 1919* (30 Stat. 1057, c. 18) *by which the terms of the Act of September 8, 1916, were materially changed, this decision has no bearing on the later statute."* (Italics ours.)

In the case of *United States* v. *Field, supra,* Mr. Justice Pitney who delivered the opinion of the Court cited *Gould* v. *Gould,* 245 U. S. 151, 153; 35 S. Ct. 53, 62, and held that the accepted canon that the provisions of such acts are not to be extended by implication should apply and in the course of the opinion said:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (Section 402 (e) 40 Stat. 1097)."

In the case of *Shwab* v. *Doyle, supra,* where the Commissioner attempted to include in the gross estate a "transfer" made before the passage of the Act, Mr. Justice McKenna likewise held that Section 402 of the Act of 1918 should not be retroactively construed as applied to Section 202 of the Act of 1916, and in the course of the opinion said:

> "If Congress, however, had the purpose assigned by the Commissioner, it should have declared it; when it had that purpose, it did declare it. In the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, par 6336 3/4c) it re-enacted Section 202 of the Act of September 8, 1916, and provided that the transfer or trust should be taxed, whether 'made or created before or after the passage of' the act. And we cannot accept the explanation that this was an elucidation of the act of 1916, and not an addition to it, as averred by defendant, but regard the act of 1918 rather as a declaration of a new purpose; not the explanation of an old one. But, granting the contention of the defendant

has plausibility, it is to be remembered that we are dealing with a tax measure, and whatever doubts exist must be resolved against it."

It is respectfully submitted, therefore, that the Circuit Court of Appeals erred in holding that Section 203 of the Act of 1916 should be construed as having the same meaning as Section 403 of the Act of 1918 in regard to the deductibility of the Massachusetts tax under the earlier act.

Fifth: The deduction of the Massachusetts Tax would Not Require Algebraic Equations to Determine the Amount of the Federal Tax.

The opinion of the Circuit Court of Appeals (Rec. p. 172) says:

> "It should not be presumed that Congress intended that a tax Statute should be construed so as to render it necessary to resort to algebraic equations to determine a tax."

No argument is necessary to prove that the Circuit Court of Appeals erred in the above statement. The fact that the deduction of the Massachusetts tax would not render it necessary to resort to algebraic equations is clearly shown by the computation of the tax in the plaintiff's Bill of Particulars (Rec. p. 17) which was attached to the amended declaration. Furthermore, the Massachusetts tax can be deducted just as easily as the taxes imposed by the States of Pennsylvania, Maryland, Utah and California, in all of which cases the Courts have held that the States taxes were deductible, and the Commissioner of Internal Revenue has made the deduction in determining the amount of the Federal Estate tax, by the simple processes of arithmetic, just as any other deduction is made.

For all the reasons stated above, the petitioner respectfully submits to this Honorable Court that the Massachusetts tax was and is a proper deduction under Section 203 (a) (1) of the Act of September 8, 1916, as amended, and that the Circuit Court of Appeals erred in holding to the contrary.

III.

THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER AND OF THE PARTIES AT THE TIME THE SUIT WAS BROUGHT.

On this point, the District Court held (1) that the plaintiff had been advised of the rejection of his claim before the suit was brought and (2) that the defendant's answer to the merits and trial thereon " constitute waiver of any right now to set up the claim that suit was prematurely brought " (Rec. p. 152).

The petitioner respectfully submits that the District Court did not err in so holding for the following reason:

First: As to the Facts:

The claim for refund upon which the suit was originally brought was filed on June 20, 1925. The Commissioner of Internal Revenue granted a hearing on the claim which was held on November 16, 1925 (Rec. p. 37) and the conferees in the Bureau of Internal Revenue stated that the Bureau considered the case as closed as the claim had been rejected in its entirety. The official notice of the rejection was received on January 16, 1925 (Rec. pp. 120–121). The defendant failed to produce any evidence whatever at the trial to show that the Commissioner had not rendered a decision upon the claim for refund before December 1, 1925, or to show the exact date upon which the Commissioner did render his decision, and bases this technical jurisdictional objection solely on the fact that on January 16, 1926, the Commissioner notified the plaintiff of the rejection of the claim.

Second: As to the Law:

The statute upon which the defendant, respondent herein, relied in support of this technical objection is Section 3226 of the Revised Statute as amended (43 Stat. c. 234, p. 342), which provides:

> " No suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time. . . . The Commissioner shall within 90 days

after any such disallowance notify the taxpayer thereof by mail."

As to the law of the case the petitioner respectfully submits that the letter of January 16, 1926 (Rec. pp. 120–121), was nothing more or less than notice of the rejection of the claim which under the statute the Commissioner was required to give within 90 days after the rejection. It is thus clear that the actual rejection of the claim might have taken place any time within 90 days prior to the letter of January 16, 1926. The Commissioner renders a decision upon a claim for refund when he signs the "Schedule upon which the Claim is listed for Allowance or Rejection".

Girard Trust Co. v. *United States*, 46 S. Ct. 229; 270 U. S. 163;
United States v. *Boston Buick Company*, 51 S. Ct. 206; 282 U. S. 476.

Third: The Defendant Waived the Right to Object to the Jurisdiction.

As pointed out by the District Court in the opinion, this is not a case where the objection to the jurisdiction of the Court may be raised at any time. Where lack of jurisdiction is not *inherent* in the very nature of the case, the objection may be waived and is waived if the defendant answers to the merits and submits to the jurisdiction of the Court. It is a well-settled rule that if the defendant objects to the jurisdiction of the Court he is required to appear specially and raise the question by a motion asking "that the suit be dismissed" or "that the process of service be quashed, vacated or set aside".

Cyclopedia of Federal Procedure, Volume 3, Par. 755, 766–767;
Panama R. R. Co. v. *Johnson*, 289 Fed. 964; aff'd. 264 U. S. 375.

In the brief subsmitted to the Court below, the respondent herein referred to the above case and quoted from the opinion as follows:

"Where a court has no jurisdiction of the subject matter,

it cannot be conferred by consent of the parties. This want of jurisdiction of the subject matter cannot be waived by a failure to raise the objection *in limine*, or at any particular stage of the proceedings. The want of such jurisdiction may be raised even on appeal."

In that same opinion, however, Mr. Justice Van Devanter, who delivered the opinion of the Court, said:

"The fundamental question, therefore, is: Did the District Court have jurisdiction of the subject matter? Section 24 of the Judicial Code (Comp. St. No. 991), so far as it is material to the question under consideration . . . gives the District Courts original jurisdiction of all suits of a civil nature at common law or in equity arising under the constitution or laws of the United States."

"In *Leon* v. *United States Shipping Board*, 286 Fed. 681, Judge Mayer, sitting in the Southern District of New York, held that under the Jones Act the action had to be brought in the district where the employer resides or has his principal place of business. But the defendant in that case appeared specially and moved that the action be dismissed on the ground of lack of jurisdiction. In other words the defendant in that case elected to insist upon its privilege and did not consent to waive it by appearing generally and failing to object. That case is plainly distinguishable from the case now before the court." . . .

"We think that the District Court for the Eastern District of New York had jurisdiction of this action, although it was not brought in the district in which the defendant resides or in which its principal office is located; the defendant having waived its privilege of requiring the suit to be brought in the district of its residence by not having appeared specially and objected to the jurisdiction. We see no reason, therefore, why the opinion of this court previously rendered, affirming the judgment below, should be set aside."

The plaintiff respectfully submits that the District Court did not err in holding that the Court had jurisdiction of the subject

matter and of the parties on December 1, 1925, the date of the writ.

IV.

THE PLAINTIFF'S ORIGINAL CLAIM FOR REFUND AND THE AMENDMENT THERETO WHICH WAS FILED WHILE THE SUIT WAS PENDING AND CONFORMED TO THE AMENDED DECLARATION SUFFICIENTLY COMPLIED WITH THE STATUTE AND REGULATIONS.

The "Brief for the Respondent in Opposition" to the allowance of the Petition for Certiorari states (p. 2), that this is the sole question which need be considered by this Honorable Court. As to the contention of the respondent and upon the facts and the law of the case in this regard the petitioner respectfully submits the following:

First: The Claim for Refund upon which the Suit was Originally Brought Was Sufficiently Broad in its Terms to Entitle the Petitioner to Recover.

The attention of this Honorable Court is invited to the broad language used in the original claim for refund (Rec. p. 112). The claim requests the refund of the amount therein specified "or such greater amount as is legally refundable".

It is respectfully submitted that this language is of vital importance in the case at bar because in the matter of the Federal Estate Tax the Statute expressly requires the Commissioner of Internal Revenue to determine and assess the correct amount of the tax, in the first instance, and also imposes a lien for ten years, for the payment of the tax, upon the property of the estate. The pertinent sections of the Act are as follows:

Section 205 (Comp. Stat. 1916, § 6336¼f).

"NOTICE AND RETURN."

"Sec. 205. The executors, within thirty days after qualifying as such . . . shall give written notice thereof to the Collector. The executor shall also, . . . file with the Collector a return under oath in duplicate, setting forth . . .

The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes." (Italics ours.)

Section 207 (Comp. 1916, § 6336½h).

"PAYMENT."

"Sec. 207. That the executor shall pay the tax to the collector or deputy collector. . . . If the amount of the tax as finally determined exceeds the amount so paid, the Commissioner shall notify the executor of the amount of such excess. From the time of such notification to the time of the final payment of such excess part of the tax interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth."

Section 209 (Comp. Stat. 1916, § 6336½j).

"LIEN."

"Sec. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. . . ."

That the Commissioner himself recognized the fact that the Statute required him to determine the correct tax is clearly shown by the published regulation of the Department.

Regulation 68—Relating to Estate Tax, Article 67.

The above regulation provides as follows:

"ART. 67. *Investigation of returns.*—An investigation of every return for estate tax will be conducted to verify its accuracy. The investigation will be made by special officers of the Bureau. . . .

Such investigation will extend to all questions in so far as they have bearing both upon the tax liability of the estate under the Federal estate tax law and the taxing act of the particular State or Territory. . . . The investigations made in cooperation with the State or Territory are, like all others, limited to an ascertainment of information to aid

the Commissioner, who alone under the law is empowered to determine the tax, in arriving at a conclusion as to the Federal estate tax liability of the estate. . . ." (Italics ours.)

The evidence in the case (Rec. pp. 47–48) shows that an investigation of the estate of William E. Walker was made pursuant to the foregoing regulations. The Revenue Agent, who investigated the estate, testified at the trial as follows:

> "At one time he investigated the estate of William E. Walker. . . . He had special regulations under which he made his investigation. They had a so-called Confidential Manual. . . . The instructions are to the effect that inheritance tax records should be examined where available. In this instance in the Walker estate he made an investigation of the inheritance tax records in the Probate Court or in the (Massachusetts) Tax Commissioner's Office."

It is thus apparent that, in regard to Massachusetts tax, the Commissioner of Internal Revenue "was not deceived or misled by the failure to describe accurately the claim".

Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228.

In view of the fact, therefore, that the original claim requested the amount "legally refundable" and the statutes and regulations provide that the Commissioner "alone under the law is empowered to determine" the proper tax, the petitioner respectfully submits that the original claim for refund even if no amendment had been filed was sufficient compliance with Section 3226 of the Revised Statute, as amended (43 Stat. c. 234, p. 342), which merely provides that "a claim for refund" must be filed in order to maintain the suit:

> "Section 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Sec-

retary of the Treasury established in pursuance thereof. . . ."

Second: The Regulations in Force at the time the Claim was Filed on June 20, 1925, did Not Expressly Require that the Claim Set Forth each Ground or Reason for Refund.

The attention of this Honorable Court is especially invited to the fact that the regulations of the Treasury Department promulgated under Section 3226 of the Revised Statutes which were in force at the time the original claim for refund was filed were not mandatory in requiring that the claim for refund "*must*" set forth and specify each reason, manner and respect in which the amount of the tax was wrongful or erroneous. Article 99 of Regulations 68, above referred to, provides as follows:

> "Art. 99. *Claim for refund.* A claim may be filed for refund of any tax, interest, or penalty, alleged to be excessive or illegal, . . . *All the facts relied upon in support of the claim should be clearly set forth under oath. . . .*" (Italics ours.)

It was not until May 1, 1929, that any regulation containing such mandatory language was promulgated.

Treasury Decisions 4265 (*C. B. VIII–1, Jan.–June, 1929, p. 110*). This regulation provides as follows:

> ". . . *The claim must set forth in detail and under each ground upon which a refund or credit is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. . . .*" (Italics ours.)

In view of the fact (1) that the original claim requested refund of such further amount as is legally refundable, (2) that the Regulations at the time the claim was filed prohibited the deduction of the Massachusetts tax and (3) were not mandatory in requiring that the claim set forth every respect in which the tax was excessive or erroneous, the petitioner respectfully submits that the original claim in and of itself was sufficient compliance with the statutes and regulations in regard to the filing of claims for refund.

Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228.

In the above case Mr. Justice Stone, who delivered the opinion of this Court, said:

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery.

Third: The "Amendment" cured all defects, if any, in original Claim.

The petitioner respectfully submits that this is not a case where suit has been brought on a different *ground* from that presented to the Commissioner in the required claim for refund. The ground specified in the original claim, as well as that alleged in the amended declaration, is "that the Commissioner of Internal Revenue has collected a Federal Estate Tax from the estate which was excessive, wrongful and illegal". The question here presented is whether after suit has been brought to recover a portion of that same tax, a taxpayer, as plaintiff, may amplify his pleading and his claim for refund in order to show as many reasons as possible why that same tax is excessive. Since the original claim for refund was filed on time, the suit seasonably brought and the whole matter of the final determination of the tax was being held in abeyance the petitioner contends that the District Court did not err either in allowing the plaintiff to amend his declaration or in giving effect to the amendment to the claim which merely conformed to the amended declaration.

Revenue Act of 1918 (40 Stat. c. 18, p. 1144).
Code of Laws of the United States, Title 28 (Par. 777).
Revenue Act of 1928 (45 Stat. c. 852, p. 791).

The Revenue Act of 1918 provides the method of collecting taxes which had accrued under all prior acts and invests the District Courts of the United States with broad discretionary powers in regard to all questions arising under the Act. The pertinent provision of that Act is as follows:

Section 1318 (40 Stat. c. 18, p. 1148) :

"Sec. 1318: . . .

The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction . . . *to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act.* The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions." (Italics ours.)

Title 28, Par. 777, of the United States Code provides:

"777. *Defects of form; amendments.*—No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe (R. S. Section 954)."

At the time the Court allowed the plaintiff to amend his declaration as well as when the amendment to the claim for refund was filed, the Revenue Act of 1928 was in force and the pertinent Section of that Act is as follows:

"SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or additional to

such tax) made after the enactment of this Act, shall be considered erroneous—

(a) If made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the Courts."

The attention of the Court is invited to the language of the above Section of the Act of 1928:

> "A refund of any portion of an internal revenue tax made after the expiration of the period of limitation for filing a claim and after the expiration of the period of limitation for filing a suit shall be erroneous, *unless within such period suit was begun by the taxpayer.*"

It is respectfully submitted that the filing of a valid claim, in the first instance, and the bringing of the suit on time suspended the running of the statute of limitations as to all matters connected with the final determination of the tax so that it was entirely proper for the District Court to allow the amended declaration and for the petitioner to file his amendment to the claim. This construction of Section 608 of the Revenue Act of 1928 is clearly supported by the regulations of the Treasury Department which were promulgated soon after the passage of that Act.

Treasury Decision 4235, C. B. VII-2, July–December, 1928, pp. 76–77.

This is a long Treasury Decision outlining the circumstances

under which claims for refund will be reopened and reconsidered by the Commissioner of Internal Revenue. As bearing upon the question of whether or not the bringing of a suit suspends the running of the statute so that a claim for refund may be amended while such suit is still pending, this Treasury Decision provides as follows:

"T. D.4235."

"REOPENING OF REFUND CLAIMS."

. . . . . .

"Any claim which has been disallowed will be reconsidered and allowed, at any time prior to the expiration of the statute of limitations for bringing suit, if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought, nor will a reconsideration of a claim be considered as a reopening".

. . . . . .

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved October 23, 1928.

A. W. MELLON,
Secretary of the Treasury."

If a claim for refund may be reconsidered after the four year period of limitation for filing such claim at any time prior to the expiration of the statute of limitation for bringing suit, an amendment to the claim for refund, which merely conforms to an allowed amended declaration and does not set up a new cause of action, is valid and proper "if it clearly appears that the" amendment "should be allowed on the merits", and this we think is especially true in view of the fact that *there is no statute or regulation which prohibits the filing of such an amendment while a suit is pending in the Federal District Court.*

Fourth: The Defendant Waived the Objection and is Estopped to Deny the Validity of the Amendment to the Claim for Refund.

The attention of the Court is called to the fact that the amendment to the claim for refund says that "the estate was

and is by law entitled to a further refund on account" of five (5) items therein specified (Rec. pp. 134–135). The fourth item is the Massachusetts inheritance tax and the fifth item is a claim for $1,000.00 for an error in computation, which was also for the first time claimed in the amendment. The evidence in the case (Rec. pp. 48–49 and 144–145) shows that the Commissioner of Internal Revenue acted upon the amendment in the regular official way and allowed the $1,000.00 item and made refund accordingly. This being true, it is respectfully submitted that the Commissioner waived the objection to the validity of the document. We contend that if the amendment was valid as to one item it was valid as to any other item which was proper and legal. Furthermore, it is clearly obvious that the reason the Massachusetts tax was not specified in the original claim was that Treasury Decision 2524 expressly prohibits the deduction of all State, transfer or succession taxes.

Arkwright Mills v. *United States,* 27 Fed. (2) 550;
Ritter v. *United States,* 28 Fed. (2) 265.

In the Arkwright Mills Case the Court said:

> "This failure to act in accordance with ordinary administrative diligence resulted to the prejudice of the petitioner, and I regard the government as estopped to now assert a right to take advantage of an error on the part of the petitioner for which its agents were directly responsible."

In the Ritter Case the Circuit Court of Appeals for the Third Circuit said:

> "It is true, as plaintiff contends, that when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. *Walker* v. *United States,* (C. C.) 189 F. 409; *Cook* v. *United States,* 91 U. S. 289, 23 L. 237; *United States* v. *Flint,* 25 Fed. Cas. p. 1107, No. 15,121. The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority."

Fifth: The Right of the Plaintiff to Amend his Declaration and his Claim for Refund to Conform thereto is Sustained Both by the Rules of the Court as well as by the Opinions of Decided Cases.

The rule of the Massachusetts Courts which has been adopted by the District Court for Massachusetts is embodied in General Laws of Massachusetts, Chapter 231, and provides as follows:

"AMENDMENTS."

"Section 51. The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enable the defendant to make a legal defense."

Under the foregoing statute as well as under *Par. 777, Title 28* of the *Judicial Code, supra*, it is submitted that even if all of the "reasons" were not fully stated in the original claim for refund and in the original declaration, the cause of action remained unchanged and that the petitioner being within the jurisdiction of the District Court was clearly within his rights in appealing to the District Court to be allowed to amend his declaration and in amending his claim for refund to conform thereto both of which were in support of the same cause of action and merely showed an additional reason why a "further portion of the Federal estate tax should be refunded". If this is not true, the inevitable consequence is that the Commissioner of Internal Revenue can, by his regulations, completely nullify and set aside the rules of the District Court and deprive taxpayers of the full benefits of the right to amend, in so far as tax cases are concerned, although such right to amend is so fully sanctioned and granted by both State and Federal Courts in all other forms of action at law.

Swift & Co. (W. Va.) v. *United States*, 67 Ct. Cls. 322;

Lehigh & Wilkes Barre Coal Co. v. *United States*, 38 Fed. (2) 637;
Seaboard Air Line Railway v. *Renn*, 241 U. S. 290;
Texas & P. Ry. Co. v. *Cox*, 146 U. S. 593, 603;
Hutchinson v. *Otis Wilcox & Co.*, 190 U. S. 552.

In the case of *Swift & Co.* (*W. Va.*), *supra*, the Court of Claims said:

> "We think, therefore, that the original claim was proper as an amendment to the original consolidated return, and in connection with the statements subsequently filed by the parent company setting out the claim in more detail, was sufficient. The Commissioner of Internal Revenue had no difficulty whatever after the filing of these papers in determining that the plaintiff was entitled to the refund. If there was any insufficiency in these statements of the parent company taken together, it was, we think, merely one of form and could be cured by such an amendment as the plaintiff subsequently filed, although it was made after the expiration of the period of limitations."

In the *Lehigh & Wilkes Barre Coal Co. Case*, *supra*, which the Government did not appeal, the Court said:

> "The question therefore raised by the affidavit of defense raising questions of law is whether the claim for refund filed February 10, 1925, was sufficient to toll the statute of limitations and to allow the amendment of June 25, 1926. Under the law, a claim for refund must be filed before the expiration of five years after the date the return was due, March 15, 1920. . . .
>
> Regardless of any defect of form or sufficiency in the original claim for refund, the delay of the Commissioner of Internal Revenue to audit the petitioner's return within the period of the statute of limitations, and the impossibility on the part of the petitioner to file a more specific claim within the period of the statute of limitations and the fact that no objection was made to the form of the petitioner's original claim for refund, which amounts to a waiver of any irregularity, and the subsequent amendment

specifying the grounds of petitioner's claim for a refund prior to the final rejection, made the claim effective. . . ."

In the case of *Hutchinson* v. *Otis Wilcox & Co., supra*, Mr. Justice Holmes delivered the opinion of the Court, in the course of which he said:

". . . The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The cause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitation has run, when the original declaration was bad. *Sanger* v. *Newton*, 134 Mass. 308: See *Re Parkes*, 10 Nat. Bankr. Reg. 82, Fed. Cas. No. 10,754; *Re Baxter*, 12 Fed. 72; *Re Glass*, 119 Fed. 509. The proceedings remained in the district court, notwithstanding the appeal and the amendment properly was allowed there."

In *Seaboard Air Line Ry. Co.* v. *Renn*, Mr. Justice Van DeVanter said:

"If the amendment merely expended or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time. . . . In these circumstances, while the question is not free from difficulty, we cannot say that the Court erred in not treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and *related back to the commencement of the suit* which was before the limitation had expired."

Sixth: The Cases Relied Upon by the Respondent are Not in Point and Applicable to the Facts in the Case at Bar.

Both in the District Court and in the Circuit Court of Appeals the respondent cited numerous cases which have held that a suit cannot be maintained on a different ground than that which

has been set forth in a claim for refund. Among these cases are the following:

Arizona Commercial Mining Co. v. *Casey*, 32 Fed. (2d) 288;
Braun v. *Lewellyn*, 38 Fed. (2d) 477;
Feather River Lumber Co. v. *United States*, 66 Ct. Cls. 54;
Jonesboro Grocery Co. v. *United States*, 66 Ct. Cls. 320;
Meinwrath Brokerage Co. v. *Crooks*, 28 Fed. (2d) 991;
Ordway v. *United States*, 37 Fed. (2d) 19;
Paul Jones & Co. v. *Lucas*, 33 Fed. (2d) 907;
Phoenix Glass Co. v. *United States*, 34 Fed. (2d) 217;
Red Wing Malting Co. v. *Willcuts*, 15 Fed. (2d) 626;
Ritter v. *United States*, 28 Fed. (2d) 265;
Southwestern Oil & Gas Co. v. *United States*, 29 Fed. (2d) 404;
Stauffer Eshleman & Co., Ltd. v. *United States*, 66 Ct. Cls. 277.

It seems unnecessary to treat these cases severally. It is sufficient to state that all of them are distinguishable from the case at bar in one or more essential respects, among which are the following:

1. In those cases the taxes involved were not *estate taxes* but other forms of taxes where the Commissioner was not required by law to determine the correct amount of the tax in the first instance.

2. In those cases it was apparent that the matters which the plaintiffs relied upon in the suits were of such nature that the Commissioner did not have, or could not reasonably be supposed to have had, full knowledge at the time he made his determination of the tax or when the suits were brought.

3. In those cases the grounds for recovery upon which the taxpayers relied in their suits were available to them and could have been set forth in a claim for refund as well as in a suit, in the sense that such grounds or reasons were not prohibited by any published ruling of the department, as was the deduction of State inheritance taxes. (Treasury Decision 2524.)

4. In those cases the question of law in regard to the plain-

tiffs' right to maintain their action because of the insufficiency of the claim for refund was seasonably and properly raised either by way of motion to dismiss plea in abatement or demurrer, and the defendants did not answer to the merits of the case.

5. In several of those cases no claim whatsoever for the tax sought to be recovered was ever filed with the Commissioner of Internal Revenue before suit was brought and in none of them was any amendment to the claim filed while the suit was still pending.

6. None of those cases involved such questions of waiver and estoppel either on the part of the Commissioner or in the proceedings in Court as are involved in the case at bar.

Seventh: The Contentions of the Respondent are Not Sustained by Recent Decisions of this Honorable Court.

The most recent decisions of this Honorable Court involving claims for refund and the requirements in regard thereto, are:

Bonwit Teller & Co. v. *United States*, 51 S. Ct. 395; 283 U. S. 258;

United States v. *Felt & Tarrant Mfg. Co.*, 51 S. Ct. 376; 283 U. S. 269:

United States v. *Swift & Co.*, 51 S. Ct. 202; 282 U. S. 468;

Lewis et al., Trustees, v. *Reynolds, Collector*, (unreported; decided January 4, 1932).

In the *Bonwit Teller Case* this court held that Section 3226 of the Revised Statutes did not apply because the second count in the petition alleged "an account stated, showing that there is due the plaintiff the amount claimed". Similarly in the case at bar the second count of the original declaration, as well as Count II of the amended declaration (Rec. p. 16), alleges that the defendant owes the plaintiff "for money had and received by the defendant to the plaintiff's use". If, therefore, that portion of the tax resulting from the refusal of the Commissioner of Internal Revenue to deduct the Massachusetts tax was, as a matter of law, refundable, the petitioner respectfully submits that the Bonwit Teller Case is in point and sustains the contention of the petitioner.

As to the Felt & Tarrant Mfg. Company case, the petitioner respectfully submits that that case is clearly distinguishable from the case at bar in the following respects:

(1) In that case the taxes involved were income taxes and the law did not impose upon the Commissioner of Internal Revenue the positive duty of determining and establishing the true and legal amount of the tax in the first instance, so that the claim for refund which merely stated that it was "filed to protect all possible legal rights of the taxpayer" was clearly insufficient to comply with the requirements of the statute and the regulations.

(2) In that case, at no time during the proceedings before the Bureau of Internal Revenue was the ground for refund which was asserted in the suit ever brought to the attention of the Commissioner of Internal Revenue, so that he might pass thereon.

(3) In that case the tax was paid on June 15, 1918, but the suit was not brought until February 14, 1927, which was more than five years as provided by the statute.

(4) In that case no amendment to the original claim for refund specifying any grounds was ever filed with the Commissioner of Internal Revenue either before or after the suit had been brought.

The case of *United States* v. *Swift & Company*, which involved the same set of facts, passed upon by the Court of Claims in *Swift & Co. (of W. Va.)* v. *United States, supra*, is in many respects in point and pertinent to the issues in regard to the claim for refund which are involved in the case at bar. In that case the taxpayer filed an original claim for refund and later filed an amendment. Mr. Justice Roberts, who delivered the opinion in the case, in referring to the question of the amendment, said:

> "The views herein expressed make it unnecessary to decide whether the later claim may properly be considered an amendment of the original claim for refund."

The case of *Lewis et al.* v. *Reynolds* seems to be directly in point on some of the issues in the case at bar. In that case the Commissioner of Internal Revenue allowed the deduction

of the State inheritance tax of Wyoming. It is clear from the language of the opinion that if in that case the State tax had been the only issue involved, the estate would have been granted a refund. In the course of the opinion in the case Mr. Justice McReynolds quoted the language of the Circuit Court of Appeals for the Tenth Circuit, which said:

> "The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax. The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

It is respectfully submitted that the language quoted above supports the petitioner's contention that the filing of the claim for refund and bringing the suit within the statutory periods suspended the running of the statute and held in abeyance the determination of the entire tax liability of the estate.

Upon all of the facts and the law of the case, therefore, the petitioner respectfully submits that the language used in the opinion of the District Court in regard to the original claim for refund and the amendment thereto are sound and just (Rec. pp. 153–154):

> "In the case at bar, the claim for refund filed June 20, 1925, conformed to the requirements of the Statutes and Regulations. . . . This amendment moreover was but a formal presentation of claims for refund that had been informally presented and discussed at hearings held upon the original claim when it was reopened after the decision of the Circuit Court of Appeals. At these conferences the whole extent of the liability of the estate for the Federal estate tax was considered, and the Commissioner, or those who represented him, had abundant opportunity to pass upon the right of the estate to claim the deduction in ques-

tion. . . . It has been urged, and I think appropriately, that in a matter involving an estate tax, it would be peculiarly compatible with justice to give effect to such an amendment inasmuch as the statute lays upon the Commissioner the positive duty of assessing the correct tax and refunding any excess. To hold that a late amendment to a claim filed on time answers the statute, does not defeat the declared purpose of the legislation if all the facts are presented to the Commissioner so that he may pass upon the claims before final determination of the tax liability, and before suit is brought to recover any tax illegally collected."

CONCLUSION.

Upon all of the facts and the law, the petitioner respectfully submits that the decision of the District Court should be sustained and that the judgment of the Circuit Court of Appeals be reversed and that the issues of this case suggest the application of the rule that all doubts, if any, in regard to the disputed questions should be resolved against the defendant and in favor of the plaintiff.

Gould v. *Gould*, 245 U. S. 151, at page 153:
United States v. *Merriam*, 263 U. S. pp. 187, 188.
Schwab v. *Doyle*, 258 U. S. 529, at page 536.

In *Gould* v. *Gould*, Mr. Justice McReynolds said:

"In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

In *United States* v. *Merriam*, Mr. Justice Sutherland quoted a strong statement of Lord Cairns and said:

"In statutes levying taxes the literal meaning of the words employed is most important. . . . If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

In *Shwab* v. *Doyle*, Mr. Justice McKenna said:

> "But, granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure, and whatever doubts exist must be resolved against it."

Respectfully submitted,

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